PD-1049-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/17/2020 9:13 AM
Accepted 4/17/2020 10:52 AM
DEANA WILLIAMSON
CLERK

PD-1049-19
In the Court of Criminal Appeals
Austin, Texas

FILED
COURT OF CRIMINAL APPEALS
4/17/2020
DEANA WILLIAMSON, CLERK

ZAID ADNAN NAJAR

vs.

STATE OF TEXAS

On review from the
Fourteenth Court of Appeals
Houston, Texas
Appellate Cause no. 14-17-00785-CR

RESPONDENT'S BRIEF

Jonathan Landers

917 Franklin Street, Suite 300
Houston, Texas 77002
Telephone: (713) 685-5000
Email: Jlanders.law@gmail.com
Najar's Attorney

ORAL ARGUMENT GRANTED

IDENTITIES OF PARTIES AND COUNSEL

1. The parties are Appellant/Respondent Zaid Adnan Najar and Appellee/Petitioner the State of Texas.

2. Counsel for Zaid Adnan Najar at trial were Emily A. Shelton and Gerald Fry, 801 Congress Avenue, Suite 350, Houston, Texas 77002.

3. Counsel for Zaid Adnan Najar on appeal is Jonathan D. Landers, 917 Franklin, Suite 300, Houston, Texas 77002. Jonathan D. Landers represented Mr. Najar in his motion for a new trial.

4. Counsel for the State at trial were Sarah Neyland and Twyanette Wallace, Harris County Assistant District Attorneys, 1201 Franklin, Suite 600, Houston, Texas 77002. Both prosecutors also represented the state before the court of appeals.

5. Additional counsel for the State on appeal is Jessica Caird, Harris County Assistant District Attorney, 1201 Franklin, Suite 600, Houston, Texas 77002. Jessica Caird continues to represent the state before this Court.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes, Rules, and Guidelines

STATEMENT OF THE CASE

Zaid Najar was charged with evading arrest with a motor vehicle on March 18, 2016. CR at 7. A jury was sworn July 17, 2017. 3 RR 3. After one day of testimony, the jury began deliberations, and the next day found Mr. Najar guilty of "evading arrest or detention, as charged in the indictment." CR at 72. Mr. Najar was sentenced by the trial judge to 10 years confinement, probated for four years, and a $500 fine. CR at 73. The judgment was entered on July 18, 2017. CR at 73. The trial court certified Mr. Najar's right to appeal. CR at 79. Mr. Najar filed a motion for a new trial on August 15, 2017, which was denied following a hearing on September 29, 2017. CR at 83-101, CR at 111. Mr. Najar filed a notice of appeal on July 18, 2017, and again September 29, 2017. CR at 119, CR at 123. The Fourteenth Court of Appeals reversed the trial court's judgment and remanded the case on August 29, 2019. The State's PDR was filed with the Court on September 27, 2019, but was struck for exceeding the word limit, and was refiled on November 8, 2019. This Court granted the State's PDR on January 29, 2020, in an order permitting oral argument.

INTRODUCTION

In its briefing before this Court the State has masterfully obfuscated the factual and legal basis of Mr. Najar's jury misconduct claim. For example, the State ignores that record is clear: not only did the trial prosecutor make "no objection" to the introduction of defense counsels' affidavits, she also agreed to the factual basis contained in the affidavits because she was present when the jurors explained they had relied on outside evidence when deciding Mr. Najar was guilty. The failure to object removes the Rule of Evidence 606(b) argument from the legal equation, and the agreed upon facts prevents the State from arguing the trial court should not have relied upon the agreed upon facts when deciding the Rule 21.3(f) issue. Indeed, the State never argued the facts were not agreed to before the Court of Appeals, or that a Rule 606(b) objection had been made; that idea was created by the dissent and easily dismissed by the majority. The only question which needs to be answered is whether a new trial was required because the jury relied upon a siren they heard from the 15th floor of the criminal courthouse to decide that Mr. Najar must have heard Officer Bachar's siren prior to the time Officer Bachar pulled behind Mr. Najar's car.

ISSUES PRESENTED

I. Texas Rule of Appellate procedure 21.3(f) requires reversal when the jury relies upon other evidence that is detrimental to the accused.

II. Texas Rule of Evidence 606(b) does not prevent the consideration of defense counsels' affidavits because the prosecution did not object to the affidavits, and because, even had an objection been made, the critical facts in the affidavit were admissible.

III. The State's arguments concerning the factual basis of the outside influence claim omits that the state agreed to the factual basis resulting in an undisputed, not merely uncontradicted, set of facts.

IV. The *Okonkwo* and *Golden Eagle* opinions are easily distinguished on their facts.

V. Based upon the agreed to facts, Texas Rule of Appellate Procedure 21.3 (f) required that Mr. Najar be granted a new trial.

STATEMENT OF FACTS

I. THE TRIAL: A QUESTION OF WHEN MR. NAJAR REALIZED OFFICER BACHAR WAS ATTEMPTING TO STOP HIM.

The defense's voir dire outlined the defense's trial strategy: Mr. Najar could only be guilty of evading arrest if he was "aware that that police officer is trying to pull him over. . ." 2 RR at 52. The defense asked the venire panel "why you wouldn't know that you were being -- a police officer was trying to pull you over?" *Id.* The venire panel was prompted into giving potential reasons why a person might not know that a police officer was attempting to effectuate a stop. *Id.*at 52-54. The

defense probed the venire panel about their willingness to apply to this knowledge requirement in an evading arrest case. *Id.*at 54-55.

In opening statements, the defense accepted that Mr. Najar was "was driving 110 miles per hour, and that is an absurdly dangerous speed. . .", but "this chase lasted a minute and a half." 3 RR at 9. The defense explained Mr. Najar's car "was surrounded by other vehicles this entire chase, up until he got right behind my client. And then my client quickly de-accelerated." *Id.* It was explained that if someone was driving as fast as Mr. Najar before the police noticed them, it "takes time to catch up to someone." *Id.* "And the officer, when he finally did get behind him, he did pull over." *Id.* Although completely omitted from the State's briefing before this Court, the arresting officer confirmed that Mr. Najar stopped his car as soon the officer pulled directly behind his speeding vehicle. *See* State's Brief at 13-17.

Officer Victor Bachar was the sole testifying witness. He explained that on March 17, 2016, he observed Mr. Najar speeding in Houston's Galleria area. 3 RR 20. As Najar's vehicle passed him, Officer Bachar noticed that Najar's car had blue and red lights in the front windshield, inside the car above the radio. 3 RR 21. After Najar passed him, Bachar turned on his lights and sirens, and drove about two miles to catch up with Najar. 3 RR 27. Bachar estimated that Najar passed him going

around 100 miles an hour, and slowed to 80 miles an hour as he drove across the lanes of traffic. 3 RR 20, 27. Officer Bachar explained how the short pursuit ended:

> A. At that time I was able to catch up to his vehicle within, I'd say about 25 feet, and he abruptly slammed on his brakes and went to the right hand shoulder. And that's when I took him into custody.

3 RR 27.

On cross examination, Officer Bachar explained that as he was attempting to catch up with Mr. Najar, he was forced to drive on the left side of the roadway. *Id.* at 49. The officer "was attempting to get behind him at that time." *Id.* at 50. Officer Bachar verified that Mr. Najar stopped as soon as the patrol car was able to catch up:

> Q. When did you finally get behind the defendant?
>
> A. Right in between Memorial and Woodway on 610 is when I was finally able to get directly behind him.
>
> Q. And what happened then?
>
> A. He slammed on his brakes and went to the right hand shoulder.

Id. at 51. Mr. Najar was already speeding heavily before the officer attempted to initiate a stop, and the officer explained that, prior to catching up with Mr. Najar, there were "cars between me and him." *Id.* at 54, 56. During the brief pursuit, the officer "was attempting to get directly behind him the entire time." *Id.* The entire

event lasted "about a minute and 15, maybe a minute and 45, and about, like I said, two miles." *Id*. at 22.[1]

In both opening and closing arguments, the defense remained consistent: Mr. Najar stopped as soon as the officer got behind him. 3 RR at 8-10, 81-90. The defense argued that Najar was so focused on driving fast and weaving in and out of traffic that he did not know the officer was attempting to stop him until the officer pulled directly behind him, but once he realized the officer was attempting to stop him he immediately stopped. *Id.* The defense repeatedly argued that Mr. Najar stopped as soon as the officer pulled behind him. *Id.*at 81-88. It was argued "that that's easily reasonable doubt." *Id.*at 89.

The state argued that when a person sees lights and hears sirens they need to pull over. *Id.* at 92-93. The state noted that the officer turned on his lights and sirens immediately after seeing Mr. Najar Speed by. *Id.* The state also apologized for the

[1] The state claims "[n]o affirmative evidence in the record suggested that appellant was unaware of the officer or uncertain that the officer intended to pull him over." *See* State's Brief on PDR at 17. This is false, Officer Bachar testified on both direct and cross examination that Mr. Najar stopped as soon as the officer was able to pull behind him. The state completely omits this fact from its briefing. The Court of Appeals, however, did not ignore this fact. *Najar v. State*, 586 S.W.3d 110, 113 (Tex. App.—Houston [14th Dist.] 2019, pet. granted) (discussing the disputed nature of the case).

lack of video in this case and urged the jury to consider the harm that could have taken place from Mr. Najar's actions. *Id.* at 94-95.

Prior to closing arguments, the judge read the jury charge. 3 RR at 81. The charge included the following standard instruction:

> During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

CR at 70. As this Court will see, the jury did not follow this instruction.

The jury began deliberating in the afternoon, retired for the day, and deliberated shortly the next morning before reaching a verdict of guilty. 4 RR 3. After the jury was polled, the trial judge explained to the jury panel that "[t]he attorneys in the case and I would like to chat with you after this case." 4 RR 6. Later the same day, the judge sentenced Mr. Najar to ten years, probated to four years. CR at 73.

II. MR. NAJAR FILED A MOTION FOR A NEW TRIAL, AND, AT THE HEARING ON THAT MOTION, THE TRIAL PROSECUTOR AGREED TO THE FACTUAL BASIS OF THE JURY MISCONDUCT CLAIM.

Mr. Najar filed a motion for rehearing alleging, in part, that the jury in his case received and considered "other evidence" during their deliberation which

required a new trial under Texas Rule of Appellate Procedure 21.3(f). CR at 103-105.[2] The motion was supported by the affidavits of both defense counsel. *Id.* at 114-117. Both affidavits noted that "[a]fter the jury found Mr. Najar guilty (and the judge assessed punishment)" both defense attorneys, "along with the prosecutor, were invited to speak with the jury in the jury deliberation room on the fifteenth floor." *Id.*at 114, 116. Of course, the prosecutor was Sarah Neyland, who handled the entire case for the prosecution. *See* Reporters Records, generally. The affidavits explained:

> During our conversation with the jury, one of the jurors told us that during their deliberations, while they were in the jury room, the members of the jury heard a siren outside on the street, and that the fact they could hear the siren from inside the jury room was considered by the jury as a whole while reaching their verdict. They believed that if they could hear a siren from inside the building, that Mr. Najar would have heard an officer's siren inside his car.

---

[2] The motion for new trial also raised an ineffective assistance of counsel claim. *See* CR at 102-117. The ineffective assistance of counsel claim was also denied by the trial court, and also raised on appeal, but the Court of Appeals did not address the merits of the claim because they granted relief on the outside influence claim. *See Najar v. State*, 586 S.W.3d 110, 116 (Tex. App.—Houston [14th Dist.] 2019, pet. granted) ("We do not reach appellant's argument on ineffective assistance of counsel because of our disposition of appellant's first issue (reverse and remand for further proceedings). *See* Tex. R. App. P. 47.1.").

> A few minutes later a different juror told us the jurors believed that when a person hears a police car behind them the person should slow down even if they don't know who the officer is trying to stop.

Id.

At the motion for new trial hearing, the prosecution, still represented by Ms. Neyland, agreed with the factual basis of the affidavits. 5 RR at 3-4. The hearing began with undersigned counsel thanking the court for permitting a hearing although Hurricane Harvey had recently hit Houston. *Id.* Counsel then introduced evidence in the form of the affidavits of trial counsel. *Id.* Counsel introduced the affidavits of trial counsel as exhibits H-1 and H-2:

> DEFENSE COUNSEL: And I think the State's already had a chance to look at them. I'd offer those into evidence. On those I would like to point out, I think the State agrees with the factual basis of that affidavit, which is, this conversation with the jury took place. I know we have a dispute on the law. I don't know if that's correct, for the record.
>
> MS. NEYLAND: That's correct.
>
> THE COURT: Any objections?
>
> MS. NEYLAND: No objections, Your Honor.

Id. The affidavits of trial counsel were undisputed and admitted into evidence without any objection. The prosecution, after agreeing to the factual basis of Exhibit's H-1 and H-2, did not offer any additional evidence on the outside influence claim.

After the parties introduced additional affidavits related to the additional ineffective assistance of counsel claim (all without objection), both parties argued the law. Undersigned Counsel noted that the prosecution was present during the conversation with the jury[3], and noted that the statements were not hearsay because they "fit into the present sense impression exception to hearsay."[4] Counsel argued why, based upon the agreed facts, a new trial was required, sometimes referring to "other evidence"[5] as an "outside influence." 5 RR at 9.

The trial prosecutor discussed "whether the jury relied upon an outside influence" and that argued that "the allegation provided by defense counsel does not equate to outside influence." *Id.* at 14-15. The prosecutor never argued the affidavits were inadmissible for any reason, or that they were factually incorrect. *Id.* at 14-16. The prosecutor never suggested she was not present with both defense counsel when the jury made the comments in question. *Id.*

---

[3] This fact was also omitted from the State's briefing before this Court.

[4] The State claims the parties' argument "addressed whether trial counsels' descriptions of a jurors' comment constituted hearsay." *See* State's Brief at 18. This is false. The only mention of hearsay was undersigned counsel's explanation of why the juror's statements, made immediately after deliberation, were not hearsay. 5 RR at 6. The prosecution never suggested that the affidavits should not be considered because they contained hearsay. No hearsay objection was ever made.

[5] See Tex. R. App. P. R. 21.3(f).

The trial court relied upon *Carter v. State,* a case relied upon by Mr. Najar in his argument in favor of the grant of a motion for new trial, in denying the claim.[6] 5 RR at 20. The Court explained:

> With respect to Counsel's argument regarding new evidence, the Court relied on Carter v. State. Jury members are expected to draw on their general experiences and perceptions while deliberating. I believe they have general experience of hearing sirens. Their persuasive argument with respect to that issue, the Court rules against that.

Id. at 20. The Court's ruling was a legal ruling: the siren was not an outside influence because jurors "have general experience of hearing sirens." *Id.* The trial judge also affirmed that her decision was based upon "all of the affidavits that this Court took into consideration." *Id.* at 21.

III. ON DIRECT APPEAL THE STATE DID NOT DISPUTE THE FACTUAL ACCURACY OF THE RELEVANT AFFIDAVITS.

On direct appeal, Mr. Najar argued that "[r]eversal was required because the jurors received outside evidence during their deliberations that was harmful to the defense." *See* Court of Appeals Brief at 10-17. In his briefing, Mr. Najar noted "that during the motion for new trial proceedings the trial prosecutor affirmed that this conversation with the jury took place as described by defense counsel." *Id.* at 8. Mr.

---

[6] *Carter v. State*, 753 S.W.2d 432 (Tex. App.-Corpus Christi- 1988). Cited by Mr. Najar at 5 RR 9-10.

Najar explained that "[a]t the hearing on the motion for new trial the parties agreed on the factual basis of the claim." *Id.* at 11. Najar relied on this Court's precedent in arguing that "[i]f there is no fact issue of whether the jury actually received the other evidence, and the evidence was adverse to the defendant, reversal is required. *See, e.g.*, *Rogers v. State*, 551 S.W. 369, 370 (Tex. Crim. App. 1977)." *Id.* at 13.

Najar's Brief on Appeal outlined the facts from the motion for new trial hearing:

> The undisputed facts are that the jurors received other evidence when they heard a siren while deliberating on the 15th floor of the criminal court house. After the jury returned a guilty verdict, trial counsel (both the defense and prosecution) spoke with the jury about the reasons for their decision. *See* Defense Ex. H1-H2. A juror told defense counsel and the prosecutor that while they were deliberating the members of the jury heard a siren outside on the street. *Id.* The jury as a whole considered the fact that they could hear the siren from inside the jury room when reaching their verdict. *Id.* The jury determined that if they could hear a siren from inside the building, then the Defendant would have heard an officer's siren while driving in his car. *Id.* Another juror told defense counsel that the jurors believed that when a person hears a police car behind them, they should slow down even if they don't know who the officer is trying to stop. *Id.*

*Id.*at 14-15.

Sarah Neyland, the prosecutor from the trial and motion for new trial hearing, was included on the State's Appellate Brief, although the brief was signed by current appellate counsel. *See* State's Appellate Brief, cover, 48. Before the Court of

Appeals, the State never contested that the trial prosecutor had agreed to the factual basis of the jury misconduct claim before the trial court. *Id.* at 7-8, 16-17, 18, 19-29. Instead, as it does now, the state claimed Rule of Evidence 606(b) somehow applied (although there was no objection), that the Rules of Evidence related to hearsay somehow applied (although there was no objection), and briefly discussed the merits of the underlying juror misconduct claim. *Id.* at 19-29.

Mr. Najar's Reply Brief explained that the Rule 606(b) argument was waived based upon this Court's clear binding precedent, and that Rule 606(b) would not apply to the factual basis of this claim had the prosecution not waived the argument by failing to object. *See* Najar's Reply Brief at 5-9. Mr. Najar also discussed the difference between uncontroverted facts and undisputed facts, and explained that this case involved undisputed facts which trial courts cannot simply discount. *Id.* at 11-12.

The majority opinion began by noting that the jury had violated the court's charge by considering outside evidence during deliberations. *See Najar,* 586 S.W.3d at 111-12. The Court of Appeals recounted the facts of the motion for new trial hearing, which were not disputed by the State before that Court:

> Appellant's counsel pointed out that the State agreed with the "factual basis of the affidavit" and that there was solely a "dispute on the law."

> Counsel for the State replied, "that's correct." And when asked by the trial court whether the State had any objections to the affidavits, the State's counsel replied, "no objections, your honor."

Id. at 113-114. The Court of Appeals also noted that the State's Rule 606(b) arguments had not been preserved for review:

> The dissent argues this was sufficient to preserve an objection based on Texas Rule of Evidence 606(b), as it references the language used in that rule. *See* Tex. R. Evid. 606(b). We disagree. The State's complaint regarding "outside evidence" was not presented until after the affidavit was admitted into evidence and after appellant's counsel made his arguments. Moreover, the State never made a formal objection to the affidavit at any time during the hearing.
>
> . . .
>
> The State argues that Texas Rule of Evidence 606(b) prohibited the trial court from considering evidence inquiring into the validity of the jury's verdict because the siren heard by the jury does not fall within the outside-influence exception. *See* Tex. R. Evid. 606(b) (prohibiting jurors from testifying about any statement made or incident that occurred during jury's deliberation, except where outside influence was improperly brought to bear on any juror). The State did not, however, object to the evidence on this or any other ground and therefore has waived its complaint. *See Lee v. State*, 816 S.W.2d 515, 517 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (State waived rule 606(b) argument on appeal when it failed to make such objection in hearing below). The State instead expressly stated it had "[n]o objections" to appellant's evidence. Accordingly, an analysis under rule 606(b), as proffered by the State, is not applicable under the circumstances.

Id. at 113, n.3; 115 n. 5.

The Court of Appeals first found that the agreed to factual basis satisfied the receipt prong of the outside influence test, and then applied the objective harm analysis required by this Court before reversing the trial court's judgment. *Id.* at 115.[7]

The dissent agreed that "under Rule 21.3(f) of the Texas Rules of Appellate Procedure, the defendant must be granted a new trial 'when, after retiring to deliberate, the jury has received other evidence.'" *Id.* at 116 (Christopher, J., dissenting). The dissent believed that, although the state had "no objection" to the relevant evidence, the record was ambiguous on whether or not the state objected. The dissent noted that the prosecutor, in her argument, used the language "outside influence" and "referred explicitly to *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012), which is one of the leading cases applying Rule 606(b)." *Id.* at 117. The dissent argued that the trial court could have determined the defense affidavits lacked credibility, even if uncontradicted. *Id.*[8] Finally, the dissent

---

[7] "We consider the character of the evidence in light of the issues before the jury in our determination of the "detrimental" prong of the test. *Alexander*, 610 S.W.2d at 753; *Carroll*, 990 S.W.2d at 762." *Id.*

[8] The dissent did not grapple with the argument that the affidavits were not only uncontradicted, but agreed to and undisputed.

disagreed the siren was outside evidence or that it was detrimental to Najar's case. *Id.* at 117.

SUMMARY OF THE ARGUMENT

The key issue in Mr. Najar's case was when he first realized that Officer Bachar was attempting to stop him. The defense argued that Mr. Najar had not evaded arrest and relied on the fact that he quickly stopped his vehicle as soon as the officer pulled behind him. However, while the jury was deliberating on the 15th floor of the criminal courthouse, they heard a siren from the street below. Violating the trial court's jury instructions, they discussed the siren and relied upon it in deciding that Mr. Najar must have heard Officer Bachar's police siren as he was speeding and weaving through traffic. The jury's consideration of the this outside evidence required a new trial pursuant to Texas Rule of Appellate Procedure Rule 21.3(f) because the jury (1) relied on other evidence that (2) was detrimental to the accused.

A reading of the State's brief suggests that the issues are not so simple, but the State ignores that the factual basis of the outside evidence claim was not only unobjected to, but also agreed to, by the trial prosecutor. Because the evidence was unobjected to, the state's reliance on Rule of Evidence 606(b) is misplaced. However, even if the prosecutor had objected on Rule 606(b) grounds, the evidence

in question would have been admissible. More important, however, is that the trial prosecutor agreed to the factual basis of the Rule 21.3(f) claim. This means that the facts were undisputed, not merely uncontradicted. This is why the trial court was not free to simply disregard trial counsel's affidavits.

The agreement created a judicial admission which estops the State from disputing the facts before the appellate courts. Indeed, the State did not dispute their agreement before the Court of Appeals. The agreed-to factual basis and failure to object also explains why the State's hearsay within hearsay argument is misplaced. This Court has held that trial courts may rely on affidavits when ruling on motions for a new trial, and the statements made to trial counsel were a present sense impression. More importantly, the hearsay argument, once again, omits that the factual basis of Mr. Najar's Rule 21.3(f) argument was agreed upon.

The State's briefing before this Court relies upon the idea that there was no factual agreement before the district court--an idea untethered from reality. When the facts are considered, it becomes clear that the majority opinion was correctly decided. Mr. Najar asks this Court to find that the grant of discretionary review was improvidently granted, or, in the alternative, to affirm the Court of Appeals's decision.

ARGUMENT

I. TEXAS RULE OF APPELLATE PROCEDURE 21.3(F) REQUIRES REVERSAL WHEN THE JURY RELIES UPON OTHER EVIDENCE THAT IS DETRIMENTAL TO THE ACCUSED.

Texas Rule of Appellate Procedure 21.3 (f) instructs that "[t]he defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons: when, after retiring to deliberate, the jury has received other evidence. . ." Tex. R. App. P. 21.3(f). "The statutory provision here applied was designed by the Legislature to guarantee the integrity of the fundamental right to trial by jury by restricting the jury's consideration of evidence to that which is properly introduced during the trial. To adequately safeguard that right from erosion, the Legislature in its wisdom created a per se rule. It is the duty of this Court to follow that mandate." *Rogers v. State*, 551 S.W.2d 369, 370 (Tex. Crim. App. 1977); *Alexander v. State*, 610 S.W.2d 750, 753 (Tex. Crim. App. 1980) (same).[9]

Following the clear mandate of the Legislature, this Court established the relevant test for determining when reversal is required: "This statute requires a new

---

[9] *Rogers* discussed the predecessor to Rule 21.3, which was more restrictive than the current rule in that it applied only to outside testimony, as opposed to any outside evidence:

> Article 40.03(7), supra, provides that a new trial shall be granted "Where the jury, after having retired to deliberate upon a case, has received other testimony; . . ."

Id. at 370.

trial if the 'other testimony' was adverse to the accused." *Rogers*, 551 S.W.2d at 370; *Alexander*, 610 S.W.2d at 752–53.

This Court has recognized the importance of undisputed evidence in the analysis of Rule 21.3(f). "Unless there is a fact issue raised on whether the jury actually received the other evidence, the statute requires reversal if the evidence was adverse to the defendant." *Rogers*, 551 S.W.2d at 370 (citation and footnote omitted). As this Court explained in *Alexander*:

> It is the settled law of this State that, where the testimony as to what occurred in the jury room is not controverted and shows that the jury during deliberation received other and new evidence, then there is no issue of fact for the trial court's determination and a new trial should be granted.

Alexander, 610 S.W.2d at 752.[10] In a case like Mr. Najar's, where the parties agree that the jury received and considered other evidence, reversal is required where the evidence is detrimental to the accused.[11] Related to whether evidence is detrimental

---

[10] *Citing Hartman v. State, 507 S.W.2d 557 (Tex.Cr.App.1974)* (quoting Davis v. State, 168 Tex.Cr.R. 399, 328 S.W.2d 315, 316 (1959)). *See also Kingston v. State*, 390 S.W.2d 752, 753 (Tex.Cr.App.1965); Spriggs v. State, 160 Tex.Cr.R. 188, 268 S.W.2d 191, 192 (1954); Gibbs v. State, 163 Tex.Cr.R. 370, 291 S.W.2d 320 (1956); McDaniel v. State, 165 Tex.Cr.R. 402, 308 S.W.2d 24, 26 (1957).

[11] *See also Shivers v. State,* 756 S.W.2d 442, 443 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (describing this Court's "'per se' rule mandating a new trial if it is uncontroverted that (1) 'other evidence' was received, and (2) such evidence was adverse to the defendant."

to the accused, "[i]t is the character of the evidence that controls the determination of this issue, and the Court will not speculate on the probable effects on the jury or the question of injury." *Rogers*, 551 S.W.2d at 370.

Importantly, it is immaterial if the outside evidence considered by the jury came from a juror's own personal knowledge. In *Rogers,* for example, the jury foreman "told the other members of the jury during deliberations that he had been in an armed robbery and that he could identify the perpetrator of that crime within three years of the offense." *Id.* "The fact that such statements were made during the jury deliberations on guilt [was] undisputed." *Id.* This Court reversed the conviction because the jury had received outside evidence. In finding that the outside evidence was detrimental, the Court noted: "In the case at bar, identification was a central issue, and the foreman's statement was adverse to appellant's attack on that issue." *Id.* Following the duty mandated by the Legislature, this Court reversed and remanded the case to the trial court.

In *McGary v. State*, the Dallas Court of Appeals reversed the defendant's driving while intoxicated conviction where, after the jury had retired to deliberate, one of the jurors stated that if she had had as much to drink as the defendant, she would have been drunk. 658 S.W.2d 673 (Tex. App.—Dallas 1983, pet. ref'd). Like Najar's case, "[t]he fact that such statements were made during the jury deliberations

on guilt is undisputed." *Id.* at 674. In finding that the outside evidence was detrimental, even though it was based upon the jurors own personal experience, the court noted that "[i]n the case at bar, the central issue was the intoxication of the appellant." *Id.* The court found the "character of the 'other evidence' went directly to the central issue in this case[,]" and therefore reversal was required. Finally, other evidence received by the jury can be considered detrimental even if only one juror receives the evidence even when that juror claimed the evidence had not influenced his verdict. *See Shivers v. State*, 756 S.W.2d 442, 445 (Tex. App.—Houston [1st Dist.] 1988, no pet.).

Rule of Appellate Procedure 44.2 has no place in the outside evidence analysis framework. Rule 44.2 provides the standards of harm necessary for reversal for constitutional and other errors. *See* Tex. R. App. P. 44.2. However, Rule 21.3(f) mandates reversal "when, after retiring to deliberate, the jury has received other evidence." *See* Tex. R. App. P. 21.3(f). Rule 21.3 specifically omits any further inquiry into harm. *Id.* As discussed *supra*, the Legislature mandated reversal without a further showing of harm to guarantee the integrity of the fundamental right to trial by jury. Applying Rule 44.2 would violate the Legislative intent of Rule 21.3(f), and to the extent the rules conflict with each other, Rule 21.3(f) prevails because it is the more specific provision. Tex. Gov't Code § 311.026; *See also*

Cheney v. State, 755 S.W.2d 123, 126–27 (Tex. Crim. App. 1988) (discussing Government Code § 311.026).

As shown in the pages that follow, because it is undisputed that Mr. Najar's jury received and considered outside evidence detrimental to his defense, the Court of Appeals properly reversed the trial court's judgment.

II. TEXAS RULE OF EVIDENCE 606(B) DOES NOT PREVENT THE CONSIDERATION OF DEFENSE COUNSELS' AFFIDAVITS BECAUSE THE PROSECUTION DID NOT OBJECT TO THE AFFIDAVITS, AND BECAUSE, EVEN HAD AN OBJECTION BEEN MADE, THE CRITICAL FACTS IN THE AFFIDAVIT WERE ADMISSIBLE.

A. In Texas, a party must make a timely objection, otherwise evidentiary complaints are waived.

"[T]o preserve error, an objection must be timely, specific, pursued to an adverse ruling, and, with two exceptions, contemporaneous—that is, made each time inadmissible evidence is offered." *Geuder v. State*, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). The two exceptions are when a party either obtains a running objection or requests a hearing outside the presence of the jury. *Id.* Neither exception is applicable here. "This 'raise it or waive it' forfeiture rule applies equally to goose and gander, State and defendant." *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002).

As the majority opinion correctly noted, a Rule 606(b) argument can be waived by the State's failure to object. *See Najar,* 586 S.W.3d at 115, n. 5 (*citing Lee v. State*, 816 S.W.2d 515, 517 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (State waived rule 606(b) argument on appeal when it failed to make such objection in hearing below)). This Court, and every court to consider the issue, has held that the State may waive a Rule 606(b) objection, permitting consideration of the unobjected-to facts. This Court has specifically held that when neither party objects, juror affidavits are properly before the trial and appellate courts. *Salazar v. State*, 38 S.W.3d 141, 147 (Tex. Crim. App. 2001) ("[B]oth parties withdrew their 606(b) objections, leaving the testimony and affidavits of the jurors available for our consideration in determining whether reversible error occurred."); *See also Bader v. State*, 777 S.W.2d 178, 181 (Tex. App.—Corpus Christi 1989, no pet.) ("No objection was raised to the admission into evidence of the affidavit of Juror Bailey; therefore, the applicability of Rule 606(b) of the Rules of Criminal Evidence is not before us.").[12]

[12] *See also Rogers v. State*, 01-02-01024-CR, 2004 WL 253265, at *10 (Tex. App.—Houston [1st Dist.] Feb. 12, 2004, pet. ref'd); *Latham v. State*, 12-05-00146-CR, 2006 WL 2065334, at *3 n.1 (Tex. App.—Tyler July 26, 2006, no pet.).

The Court of Appeals correctly decided that the state waived their Rule 606(b) arguments. As the lower court found, "The State instead expressly stated it had '[n]o objections' to appellant's evidence. Accordingly, an analysis under rule 606(b), as proffered by the State, is not applicable under the circumstances." *See Najar,*586 S.W.3d at 115, n. 5. The dissent argued the "no objection" statement was "ambiguous" because the prosecution "then went on to argue that the siren discussed in the affidavits was not an 'outside influence,' which invokes the language of Rule 606(b). The prosecutor also referred explicitly to *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012), which is one of the leading cases applying Rule 606(b)." *Id.* at 117.

The majority opinion easily dispatched with this idea because "[t]he State's complaint regarding 'outside evidence' was not presented until after the affidavit was admitted into evidence and after appellant's counsel made his arguments. Moreover, the State never made a formal objection to the affidavit at any time during the hearing." *See Najar,*586 S.W.3d at 113, n.3. The majority was simply applying this Court's long-standing rule that objections must be specific, contemporaneous and ruled upon. *See, supra.*

B. The State never argued that the affidavits should not be considered in the trial court.

The majority is correct, not only did the state have "no objection" to the affidavits of defense counsel, but the state never suggested to the trial court that the affidavits, or any portions of the affidavits, were inadmissible or that the affidavits could not be considered. *See* 5 RR 5-22. After Mr. Najar's legal argument, the state made their legal argument. 5 RR at 14. The state contrasted this Court's holding in *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012) with the First District Court's opinion in *Gahagan v. State*, 242 S.W.3d 80 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). It is true that *McQuarrie* specifically discusses Rule 606(b), but *Gahagan* discussed only Rule 21.3(f) of the Texas Rules of Appellate Procedure and whether the jury in that case received other evidence. Of course, the two rules are closely related, as Rule 21.3(f) explains that a new trial *must* be granted when the "jury has received other evidence[,]" and Rule 606(b) discusses what evidence may be presented in a motion for new trial (when juror testimony is objected to). The prosecutor explained that "[t]he two cases truly illustrate the fine line in that it is outside influence when a jury, while deliberating, discovered a new fact." 5 RR at 15.

A review of the record establishes the State's legal argument was based solely on the idea the Mr. Najar did not deserve a new trial pursuant to Texas Rule of

Appellate Procedure 21.3(f), and in no way suggested the affidavits were not admissible pursuant to Texas Rule of Evidence 606(b). Before this Court, the State makes the following factual claim:

> The parties addressed the exception described in Texas Rule of Evidence 606(b)(2)(A) to the general preclusion of juror testimony because no party may use it to impeach a verdict. Unless describing "an outside influence…improperly brought to bear on any juror," inquiries into the validity of a verdict may not be proven with any evidence of a juror's statement about an incident or comment that occurred during deliberations.

See State's Brief on PDR at 18-19. This claim is absolutely false. Neither party made an argument suggesting the affidavits were inadmissible. 5 RR at 3-20. The arguments of both parties dealt only with the merits of the underlying outside evidence claim. *Id.* This explains why the State never argued before the Court of Appeals that a Rule 606(b) objection was tendered in the district court. *See* State's Appellate Brief, generally. Indeed, prior to the dissent's claim that the state's "no objection" to the affidavits was "ambiguous," neither party believed that the state had objected to trial counsel's affidavits. *Najar*, 586 S.W.3d at 116 (Christopher, J., dissenting.)

C. Even had the State made a Rule 606 objection, the affidavits would have been admissible.

Even had the state objected to the admission of trial counsels' affidavits on Rule 606(b) grounds, the affidavits would have been admissible. The undisputed affidavits explained in relevant part:

> I was lead counsel for Mr. Zaid Najar during his guilt-innocence jury trial on evading arrest. After the jury found Mr. Najar guilty (and the judge assessed punishment), myself and second chair Gerald Fry, along with the prosecutor, were invited to speak with the jury in the jury deliberation room on the fifteenth floor. The jury deliberation room is on the outside of the building and has windows that overlook the downtown streets of Houston. . . .
>
> During our conversation with the jury, one of the jurors told us that during their deliberations, while they were in the jury room, the members of the jury heard a siren outside on the street, and that the fact they could hear the siren from inside the jury room influenced their verdict. They believed that if they could hear a siren from inside the building, that Mr. Najar could have heard an officer's siren inside his car.

Defense Ex. H-1, H-2 (at 6 RR 20-24).

The state relies upon *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012) and *Colyer v. State*, 428 S.W.3d 117 (Tex. Crim. App. 2014) in arguing that the affidavits should not have been considered by the trial court. *See* State's Brief on PDR at 23-31. But both cases counsel that that trial counsel's affidavits would have been admissible even had the prosecution objected to their admissibility.

McQuarrie was a sexual assault case where a juror researched the effects of date rape drugs and relayed her research to fellow jurors during deliberations. 380 S.W.3d at 148. "The trial court determined that the affidavits did not show an outside influence and refused to consider them pursuant to Rule 606(b)[,]" and denied the motion for new trial. *Id.* This Court explained that "Texas Rule of Evidence 606(b) prohibits a juror from testifying about 'any matter or statement occurring during the jury's deliberations,' with two exceptions. Tex.R. Evid. 606(b). [One of which is a] juror may testify about 'whether any outside influence was improperly brought to bear upon any juror." *Id.*at 150 (footnotes omitted). This Court examined the rule's history and did "not believe that the history of Rule 606(b) dictates that we adopt a more narrow construction of the rule than the plain language suggests." *Id.* at 152. This Court recognized that the Rule 606(b) was necessary to protect the fair administration of public justice. *Id.* at 153. In *McQuarrie*, this Court returned to a "plain-meaning interpretation of outside influence: something originating from a source outside of the jury room and other than from the jurors themselves." *Id.* at 154. Clearly, the siren heard and considered by the jurors in Mr. Najar's case fits this plain-meaning. The jurors did not consider their own personal knowledge of loud sirens; instead, the jury considered a siren that came from outside of the jury deliberation room on the 15th floor of the Criminal

Justice Center, and decided that if they heard the siren then Najar must have heard the siren of Officer Bachar. The jury, violating the trial court's instructions, considered evidence emanating from outside of the deliberation room and deviating from evidence presented at trial when deciding that Mr. Najar was guilty.[13]

In *Colyer,* this Court held that "[p]ersonal pressures—such as a fear of inclement weather or concern about a child's illness—are not 'outside influences' under Texas Rule of Evidence 606(b). Accordingly, juror testimony about these issues is not admissible." 428 S.W.3d at 119. It should be noted that in *Colyer,* "[f]rom the start, the State opposed the motion, arguing that there was no legal basis for a hearing because '[a]ny evidence outside of the record which the Defense at this time wishes to present to the Court is specifically prohibited by Rule 606(b) of the Texas Rules of Evidence.'" *Id.* at 120.[14] As result, this Court found that the state had "objected to all testimony" by the relevant witness and therefore "the evidence was not 'uncontroverted.'" *Id.*at 127, n. 56. The State's Brief before this Court misleadingly suggests that *Colyer* held that a trial court may apply Rule 606(b) even

[13] In *McQuarrie,* this Court held the "trial court abused its discretion in excluding, pursuant to Rule 606(b), the jurors' testimony and affidavits offered by Appellant at the hearing on his motion for new trial, and the court of appeals erred to hold otherwise." *Id.*at 155.

[14] The State omits this fact from their analysis.

if the prosecution failed to object to objectionable evidence,[15] but a review of *Colyer* shows that the prosecutor in that case properly objected to the evidence in question.[16]

In any event, this Court used *Colyer* to refine the outside influence test. The Court reaffirmed the test established by *McQuarrie*, but also established that the "'outside influence' exception in Rule 606(b) does not include influences or information that are unrelated to the trial issues." *Id.* at 125, 128. "Second, the outside influence must be improperly brought to bear with an intent to influence the juror." *Id.* at 128-29. The Court, discussing *McQuarrie,* noted this second requirement is met when a juror discusses the outside evidence "in an effort to affect the verdict." *Id.*

Once again, the facts of Mr. Najar's case meet each element of the Rule 606(b) test. We have already established the siren came from outside the jury room. The reliance on the siren by the jury was also related to the main contested issue at trial. As the Court of Appeals found, the "central issue in the evading-detention case was whether the appellant was aware that Bachar was attempting to detain him." *Najar*,

---

[15] *See* State's Brief on PDR at 26-27.

[16] Of course, there is no evidence that the prosecutor in *Colyer* agreed to the factual basis of the defendant's motion for new trial.

586 S.W.3d at 115. "[T]he jury's ability to hear the siren from fifteen floors above led the members of the jury to believe that appellant must have heard Bachar's siren, but deliberately ignored it in an attempt to evade detention." *Id.* The evidence also established that the jury intentionally used the outside evidence to influence their decision as required by the "improperly brought to bear" element. *See* Defendant's Ex. H-1; H-2.

In *Colyer*, this Court noted that an "'outside influence' is problematic only if it has the effect of *improperly* affecting a juror's verdict in a particular manner—for or against a particular party." 428 S.W.3d at 129. In this case, the jury used their ability to hear the passing siren from the 15th floor of the criminal courthouse to conclude "that the fact they could hear the siren from inside the jury room influenced their verdict." *See* Defendant's Ex. H-1, H-2. "They believed that if they could hear a siren from inside the building, that Mr. Najar could have heard an officer's siren inside his car." *Id.* The jury used the outside siren, not their personal knowledge of police sirens, to credit the state's argument that Mr. Najar knew he was being pursued early on in the short pursuit, and to discount the defense's argument that Mr. Najar stopped as soon as he was aware the officer was attempting to detain him. The trial counsels' affidavits meet all the requirements for admission under Rule 606(b).

III. THE STATE'S ARGUMENTS CONCERNING THE FACTUAL BASIS OF THE OUTSIDE INFLUENCE CLAIM OMITS THAT THE STATE AGREED TO THE FACTUAL BASIS RESULTING IN AN UNDISPUTED, NOT MERELY UNCONTRADICTED, SET OF FACTS.

A. The factual basis of the Rule 21.3(f) claim was undisputed, not merely uncontradicted.

The State concedes that "[t]he *Colyer* opinion made clear the distinction between a statement being 'uncontroverted' and one that revealed an 'undisputed Fact' when it explained that an undisputed fact was one that both parties agreed to or a fact about which the trial court could take judicial notice." *See* State's Brief on PDR at 33. In Mr. Najar's case, because "State's counsel affirmed that it agreed with the factual basis of this affidavit, specifically that the 'conversation with the jury took place,'"[17] the factual basis of this claim was agreed to and solidified before the trial court.

The cases relied upon by the State explain the difference between uncontradicted facts, which a trial court is free to disbelieve, and undisputed facts, which must be considered. In *Colyer*, this Court noted that "uncontradicted testimony" was of the type presented in that case: objected-to evidence that the opposing party does not rebut with specific testimony. *Colyer*, 428 S.W.3d at 122.

[17] *Najar*, 586 S.W.3d at 114.

However, "undisputed facts" include "those facts both parties agree to. . . ." *Id.* In *Colyer,* this Court cited *Evans v. State*, 202 S.W.3d 158 (Tex. Crim. App. 2006) when explaining the difference between the two types of facts.

In *Evans*, the Court explained:

> There is, however, an important distinction between "uncontradicted testimony" and "undisputed facts." For example, a defendant's mother may testify that the defendant was with her in Oshkosh on the night of the murder. Even though the State does not cross-examine the defendant's mother, the jury is not required to believe her uncontradicted testimony. She is, after all, the defendant's mother. On the other hand, facts that both parties agree (or assume) are true—in this case, for example, that appellant was seated within arm's length of a coffee table strewn with baggies of cocaine when the police entered the house—are "undisputed facts,"[16] Although the parties may disagree about the logical inferences that flow from undisputed facts, "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."

Evans, 202 S.W.3d at 163. Because the facts were agreed to in Mr. Najar's case, the parties can disagree about the logical inferences that flow from the facts, but the fact finder was not free to take a clearly erroneous view of the facts. The only logical view of the facts is that the jury heard a siren emanating from outside of their 15th floor deliberation room, considered the siren during deliberations as if it were evidence in the case, and used the fact they could hear the siren against Mr. Najar at trial.

In *Evans*, this Court also considered the Texas Supreme Court's jurisprudence concerning conclusive evidence, noting that "[s]uch evidence 'becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied,' or 'when a party admits it is true.'" *Id.* at n. 16. Applying the "undisputed fact" construct in *Evans*, this Court found that the appellant in that case "could not now dispute" facts to which he had previously agreed. *Id.* The same finding should apply here.

In *Charles v. State*, this Court also discussed the difference between uncontradicted facts and undisputed facts. 146 S.W.3d 204 (Tex. Crim. App. 2004) (superseded by statute on other grounds). This Court contrasted uncontradicted facts, which can be discounted by the trial judge, with positive facts, which could have been controverted by opposing counsel. *Id.* at 210. This Court noted affidavits "are not always well-suited for resolving disputed facts. This is especially a problem when only one party is in possession of most of the salient facts." *Id.*at 210. Of course, in the present case, both parties were in possession of the salient facts because both parties were present when the jury recounted their reliance on the siren from the street below.

Charles involved a claim of ineffective assistance of counsel, and "[w]ith claims of ineffective assistance of counsel like appellant's, the persons with the most,

if not exclusive, knowledge of the salient historical facts will normally be the defendant and his former attorney." *Id.* Clearly, this is dissimilar to Mr. Najar's case where both the trial prosecutor and defense counsel spoke with the jury immediately after the verdict was returned, and where the parties agreed to the facts discussed by the jury. This Court cited favorably the Civil Rules of Procedure related to affidavits which can establish a fact before a trial court:

> The Texas Rules of Civil Procedure state that affidavits from an interested party may establish a fact for summary-judgment purposes only if that evidence is "clear, positive and direct, otherwise credible, and free from contradictions and inconsistencies, and could have been readily controverted." The phrase "could have been readily controverted" means "the testimony at issue is of a nature which can be effectively countered by opposing evidence."

Id. This Court noted that "[a] trial judge has discretion to discount factual assertions in an affidavit by an interested party that do not meet this test." *Id.*

The corollary to this statement is that a trial judge does not have discretion to discount factual assertions that are direct, credible, and can be readily controverted. These are exactly the type of affidavits we have in Mr. Najar's case. The affidavits were direct: the jury considered the outside evidence in the form of the siren they heard from the 15th floor of the criminal courthouse. The affidavit was credible in that its source was the jury itself, immediately after finding Mr. Najar guilty. And the affidavits could have been readily controverted because the same prosecutor

handling the motion for new trial was present when the jury explained their reliance on outside evidence. Indeed, it is absurd to believe the trial prosecutor would not have corrected the record if she believed the affidavits misstated the facts in any way.[18]

B. The State agreed to the factual basis of the Rule 21.3(b) claim before the trial court, and is barred from disputing the facts on appeal.

By agreeing to the factual basis of this claim, the state made a judicial admission, which bars the state from disputing the relevant facts. The Amarillo Court of Appeals has explained this legal doctrine:

> In Texas a party may use a formal judicial admission made by a party opponent as a substitute for evidence, if the statement is clear, definite, and unambiguous. 1A R. Ray, Texas Practice: Law of Evidence § 1127 (3d ed. Supp.1986). The source of a judicial admission may be facts alleged in a pleading, an agreed upon statement of fact, a stipulation, or a formal declaration made in open court by a party or counsel. *Id.* § 1127 (3d ed. 1980). As long as the source of the admission remains unretracted it must be taken as true by the court and the jury. It is binding on the declarant and he cannot introduce evidence to contradict it. *Id.*
>
> A similar and related concept is that of judicial estoppel. Unlike the familiar doctrine of equitable estoppel, judicial estoppel is not grounded on elements of detrimental reliance or injury in fact. Instead, judicial estoppel "arises from positive rules of procedure based on justice and

[18] *See also Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012), overruled on other grounds by *Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018) (citing this same passage from *Charles*).

> sound public policy." It effectively estopps a party who has taken a position in an earlier proceeding from taking a contrary position at a later time. *Long v. Knox,* 155 Tex. 581, 291 S.W.2d 292, 295 (1956).

Davidson v. State, 737 S.W.2d 942, 948 (Tex. App.—Amarillo 1987, pet. ref'd).

This Court has embraced a similar doctrine and has explained that when a defendant stipulates to facts before the trial court, "[h]is stipulation is a kind of judicial admission." *Bryant v. State*, 187 S.W.3d 397, 400 (Tex. Crim. App. 2005). When the prosecution in Mr. Najar's case agreed to the factual basis of this claim, the prosecution "removed the need for proof" of the underlying factual allegation. *Id.* at 402. All that was necessary was to apply the law to the agreed facts. This is why the State's current argument, faulting Najar for not calling witnesses to testify at the motion for new trial hearing,[19] is misplaced: there was no need to call witnesses because the prosecution agreed to the underlying facts of the outside evidence claim.

The state now argues the trial prosecutor might not have agreed to the factual basis of this claim, but the state never took that position before the Court of Appeals. *See* State's Brief on PDR, at 34-36. The State claims the "prosecutor's comment did not stipulate to the truth of defense counsels' affidavit." *Id.* This reading of the

[19] *See* State's Brief on PDR at 37.

record is unreasonable. First, it must be remembered that the affidavits establish that the prosecutor was present when then jury spoke about their reliance on the outside siren. *See* Defendant's Ex. H-1, H-2. When introduced at the motion for a new trial, Undersigned Counsel pointed out his belief that "the state agrees with the factual basis of that affidavit, which is, this conversation with the jury took place. I know we have a dispute on the law. I don't know if that's correct, for the record." The prosecutor explained, "[t]hat's correct." 5 RR at 4. It is ridiculous to think that a prosecutor who was present for the conversation to the jury would state "that's correct" if the affidavits misstated the facts in any way.

The State also argues that "[t]he prosecutor disputed the appellant's version in argument. . ." *See* State's Brief at 36. Once again, that is false. The state never suggested the factual basis established by Defendant's Exhibits H-1 and H-2 was in dispute. 5 RR at 14-16. If the factual allegations contained in the affidavits were false, the prosecutor would have corrected the facts for the trial court, as required by Texas's ethical rules. Tex. Disciplinary R. Prof. Conduct R. 3.03.

Because the State agreed to the facts before the trial court, the state should not be permitted to argue that Mr. Najar failed to adequately establish the facts before the trial court. *Id*.[20]

IV. THE *OKONKWO* AND *GOLDEN EAGLE* OPINIONS ARE EASILY DISTINGUISHED ON THEIR FACTS.

The state also argues that the trial court was free to disregard the agreed upon factual basis because trial counsel's affidavits constituted hearsay within hearsay. *See* State's Brief on PDR at 38-41. The State relies upon *Okonkwo v. State*, 398 S.W.3d 689 (Tex. Crim. App. 2013) and *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362 (Tex. 2000) for this argument. Before explaining how the State's reliance on these cases is misplaced, it should be noted that when reviewing a motion for new trial, "[a] trial court may rule based on sworn pleadings and affidavits without oral testimony; live testimony is not required." *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006). Also, the juror's statements to trial counsel fit squarely within the present sense impression exception to the rule

---

[20] *See also Velez v. State*, 240 S.W.3d 261, 265 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (relying on *Bryant v. State* in holding that the state was bound by its stipulation that the defendant had standing to contest a search under the Fourth Amendment); *Stone v. State*, 919 S.W.2d 424, 426 (Tex. Crim. App. 1996) (defendant bound by his stipulation as to what a witness would testify about had they been present at trial.); *Bender v. State*, 739 S.W.2d 409, 412 (Tex. App.—Houston [14th Dist.] 1987, no pet.) ("Stipulations are reasonably and liberally construed with a view of effectuating the parties' intentions.").

against hearsay: "A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Tex. R. Evid. 803 (a). And, of course, the state agreed to the facts before the district court.

One glaring difference between *Okonkwo* and this case is that *Okonkwo* did not involve the prosecution agreeing to the facts of trial counsel's affidavit. 398 S.W.3d at 689 (discussing the facts of the case). When this Court stated that "the appellate court must afford almost total deference to a trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor" the Court cited *Riley,* discussed *supra.* *Riley* was another case discussing that parties may establish facts with evidence that is clear, positive, credible, free from contradiction, and could readily have been controverted. *Riley*, 378 S.W.3d 457. In *Okonkwo,* where the facts were not easily disputed, the trial court was free to find an uncontracted, as opposed to an undisputed, affidavit was not credible.

Of course, *Okonkwo* was an ineffective assistance of counsel case. That legal claim itself calls for a very deferential standard of review. "Courts commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it." *Okonkwo*, 398 S.W.3d at 693. A claim based upon Texas Rule

of Appellate Procedure article 21.3(f) does not give courts such unfettered discretion. The rule *requires* a new trial "when, after retiring to deliberate, the jury has received other evidence." Tex. R. App. P. 21.3 (f). The test established by this Court is straightforward: when the jury receives outside evidence, requirements for reversal are "(1) that the evidence be detrimental to the accused and (2) that it be received by the jury." *Stephenson v. State*, 571 S.W.2d 174, 176 (Tex. Crim. App. 1978). This is hardly the deferential standard relevant to ineffective assistance of counsel claims.

The issue in *Golden Eagle* was "whether procedural and evidentiary rules may constitutionally prohibit jurors from testifying post-verdict about statements made during deliberations, unless such statements concern outside influences." *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 364 (Tex. 2000). The case involved Rule 606(b) and Texas Rule Civil Procedure 327, which covers motions for new trial based upon jury misconduct in civil cases, and which includes a distinctly different statutory language then Rule 21.3(f). *Id.* The case involved a motion for new trial and affidavits establishing a factual basis which was not agreed to by the opposing party, and which were admitted "without limitation 'to the extent they contain appropriate evidentiary matters for consideration under Rule 327,' and otherwise for

the purposes of Jackson's bill of exceptions." *Id.* at 365. In other words, they were admitted with specific limitations, a circumstance not applicable to Mr. Najar's case.

In upholding the trial court's denial of a motion for new trial, the Texas Supreme Court noted the more exacting standards for a new trial in the civil context: To warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury. *Id.* at 372. The Court went on to hold that the affidavits and testimony at the hearing were not conclusive and were open to interpretation. *Id.* at 373. In passing, the Court stated "the trial court may not have considered Frederick's testimony to have been credible. It was certainly hearsay, and while no objection was made to its admission to preclude the trial court from considering it, the trial court was nevertheless free on its own to disregard the testimony." *Id.*

There are notable differences between *Golden Eagle* and the instant case, which go beyond the civil vs. criminal context. First, there was not an agreed factual basis for the motion for new trial. Second, the trial judge admitted counsel's affidavits for a limited purpose. Had this been done in Mr. Najar's case, for example, had the prosecution objected, Mr. Najar could have subpoenaed the jurors themselves to testify at the hearing. However, as the State is well aware, the trial prosecutor agreed to the factual basis of the affidavits, making juror testimony

unnecessary. The state should not be allowed to pull a bait and switch and fault Najar for not calling witness now. Finally, and maybe most importantly, the affidavits in Najar's case are conclusive: members of the jury heard a siren outside on the street, they considered that fact in their deliberations, and it influenced the verdict in favor of the state.

Because the parties agreed to the facts of the case and the factual basis of the outside evidence claim was clear, the state's arguments suggesting that the trial court could simply disregard the agreed-to evidence lacks merit. This idea is bolstered by the fact that the trial judge told us she considered the affidavits in reaching her decision. 5 RR at 21.

V. BASED UPON THE AGREED TO FACTS, TEXAS RULE OF APPELLATE PROCEDURE 21.3 (F) REQUIRED THAT MR. NAJAR BE GRANTED A NEW TRIAL.

After de-obfuscation, it becomes clear that the majority correctly decided the merits of the outside evidence claim. The opinion correctly identified the agreed-upon facts:

> Attorneys for the State and for appellant interviewed the jury after announcement of the verdict. One of the jurors informed the attorneys that while they were in the jury room deliberating, they heard a siren coming from outside on the street fifteen floors below. The members of the jury reasoned that if they could hear the siren while inside the building, appellant should have been able to hear the officer's siren while in his vehicle. The juror said this reasoning was used by the jury

> as a whole in finding appellant guilty of the charged offense.
>
> . . .
>
> Appellant's counsel pointed out that the State agreed with the "factual basis of the affidavit" and that there was solely a "dispute on the law." Counsel for the State replied, "that's correct." And when asked by the trial court whether the State had any objections to the affidavits, the State's counsel replied, "no objections, your honor." The court admitted the affidavits into evidence.

Najar, 586 S.W.3d at 113.

The Court noted the abuse of discretion standard applied when reviewing a trial court's decision on a motion for new trial, but also noted the mandatory requirement of a new trial when a jury receives outside evidence. *Id.* at 114. The majority correctly explained, "Texas Rule of Appellate Procedure 21.3(f) provides that a defendant must be granted a new trial when, after retiring to deliberate, the jury has received other evidence." *Id.* (*citing* Tex. R. App. P. 21.3(f).). Relying on its own precedent, the Court explained that "[t]o be entitled to a new trial under this provision, the movant for new trial must show both: (1) the jury received other evidence and (2) the evidence was detrimental." *Id.* This, of course, is the standard required by this Court. *See Stephenson v. State*, 571 S.W.2d 174, 176 (Tex. Crim. App. 1978); *see also Carroll v. State*, 990 S.W.2d 761, 762 (Tex.App.—Austin 1999, no pet.)*; Avalos v. State,* 850 S.W.2d 781, 783 (Tex.App.—Houston [14th Dist.] 1993, no pet.) (interpreting Rule 30(b)(7) of the Texas Rules of Appellate

Procedure). The Court of Appeals also noted, relying on this Court's precedent, that "[i]f there is no fact issue that the jury received other evidence, and the evidence was adverse to the defendant, then reversal is required." *Najar,* 586 S.W.3d at 114 (*citing Rogers v. State*, 551 S.W.2d 369, 370 (Tex. Crim. App. 1977).[21]

The majority opinion then applied the facts to the applicable law:

> State's counsel affirmed that it agreed with the factual basis of this affidavit, specifically that the "conversation with the jury took place." The State neither contested that the jury heard and discussed the siren while deliberating, nor that the members of the jury had relied on their ability to hear the siren in finding appellant guilty. Further, the State did not present evidence to counter trial counsel's affidavit. Because there is no evidence contradicting trial counsel's unobjected-to affidavit, no factual dispute in that regard was presented for the trial court's resolution. This satisfies the "receipt" prong of the test. *See Alexander v. State*, 610 S.W.2d 750, 751–52 (Tex. Crim. App. [Panel Op.] 1980) (where testimony as to what occurred in jury room is not controverted and shows that jury during deliberation received other and new evidence, then there is no issue of fact for trial court's determination); *Rogers*, 551 S.W.2d at 370(holding unless there was fact issue raised on whether jury actually received other evidence, former Code of Criminal Procedure article 40.03(7) required reversal if evidence was adverse to defendant); *Carroll v. State*, 990 S.W.2d 761, 762 (Tex. App.—Austin 1999, no pet.) (no conflicting evidence that jury received "other evidence" during deliberation).

---

[21]"Unless there is a fact issue raised on whether the jury actually received the other evidence (see Honeycutt v. State, 157 Tex.Cr.R. 206, 248 S.W.2d 124), the statute requires reversal if the evidence was adverse to the defendant." *Rogers v. State*, 551 S.W.2d 369, 370 (Tex. Crim. App. 1977).

*Id.*at 114-15.

The majority was correct that the jury received outside evidence. The undisputed facts are that the jurors received other evidence when they heard a siren while deliberating on the 15th floor of the criminal court house. After the jury returned a guilty verdict, trial counsel (both the defense and prosecution) spoke with the jury about the reasons for their decision. *See* Defense Ex. H1-H2. A juror told the attorneys that while they were deliberating, the members of the jury heard a siren outside on the street. *Id.* The jury as a whole considered the fact that they could hear the siren from inside the jury room when reaching their verdict. *Id.* The jury determined that if they could hear a siren from inside the building, then the Defendant would have heard an officer's siren while driving in his car. *Id.* Another juror told defense counsel that the jurors believed that when a person hears a police car behind them, they should slow down even if they don't know who the officer is trying to stop. *Id.*

It should be noted that although Officer Bachar's sirens were mentioned during his testimony, there was no evidence presented concerning the volume of those sirens or whether or not Najar heard the sirens in a speeding vehicle which had already passed the officer. *See* 3 RR at 21, 22, 35, 37, 47, 51. No video was played

which would have established the volume of the siren. The siren heard by the jurors was truly outside evidence.

Najar recognizes that jurors hearing a noise from outside would not require reversal in most cases. First, in most cases, we would expect the jury to follow the instructions from the trial judge that they not consider outside evidence. That simply did not happen in Mr. Najar's case. And, generally, a sound from outside of a courtroom would not be harmful to the defendant. But Mr. Najar's guilt or innocence hinged upon a calculation of when he became aware of the officer's attempt to stop his vehicle. The defense was that Najar did not know the officer was following him, and the critical issue for the jury was whether the Defendant intentionally evaded the officer. Najar's case rested upon the idea that he stopped as soon as he knew he was being pulled over. 3 RR at 81-90. But the jurors believed a person must slow down once they hear police sirens, and determined that because they could hear a siren from inside the jury room, Najar must have heard the siren in his speeding car.

The majority correctly utilized the facts of the case when finding that the siren was detrimental to Mr. Najar's case. *Najar,* 586 S.W.3d at 115-16. The state is incorrect in its claim that the majority opinion did not perform an objective analysis of the potential harm flowing from the jury's violation of the instruction not to

consider outside evidence. *See* State's Brief on PDR at 42. The opinion explained that appellate "courts consider the character of the evidence in light of the issues before the jury in our determination of the 'detrimental' prong of the test." *Najar*, 586 S.W.3d at 115. Both of the cases cited by the majority, including this Court's decision in *Alexander*, also applied an objective analysis. *Id.* The Court of Appeals then went on to provide a detailed analysis of the facts at trial, including that "[o]ne (if not, the) central issue in this evading-detention case was whether appellant was aware that Bachar was attempting to detain him." *Id.* at 115.[22] It is true that, after applying an objective analysis, the majority looked to the jury's admission that they had considered the siren in their deliberations, but as the majority correctly noted, this was permissible because the state had waived the Rule 606(b) analysis. *Id.* at 115-16.

The Court of Appeals also explained that there was no additional showing of harm necessary for reversal, a legal principle not disputed by the state. *Id.* at 116. "This is because the statutory provision applied here was designed by the Legislature to guarantee the integrity of the fundamental right to trial by jury by restricting the

[22] Both the dissent and the state completely omit the fact that Mr. Najar stopped his car as soon as after Bachar pulled behind his vehicle.

jury's consideration of evidence to that which is properly introduced during the trial. *Rogers*, 551 S.W.2d at 370. To adequately safeguard that right from erosion, the Legislature in its wisdom created a per se rule, and it is the duty of this court to follow such mandate."[23] *Id.*

Finally, it does not matter that jurors generally have knowledge about police sirens. The jurors did not rely upon their general experience with police in this case. They relied upon a siren they heard during deliberations, while they deliberated fifteen floors up in downtown Houston, to decide that Mr. Najar must have heard the police officer's siren prior to the time the officer pulled behind his speeding vehicle.

The majority opinion correctly applied the law to this unique set of facts. The key to the understanding why the state's current briefing is wrong is understanding that the prosecution agreed to the factual basis of this claim, a fact the state did not dispute before the court of appeals. The jury in this case violated the trial court's

---

[23] *Citing See Alexander*, 610 S.W.2d at 753 (citing *Rogers*, 551 S.W.2d at 370(interpreting rule **21.3**(f)'s predecessor statute, former Code of Criminal Procedure **article** 40.03(7), to require reversal without conducting harm analysis)); *see also Garza v. State*, 630 S.W.2d 272, 276 (Tex. Crim. App. [Panel Op.] 1981) (op. on reh'g) (declining to conduct harm analysis under predecessor statute); *Molina v. State*, No. 07-00-0029-CR, 2003 WL 141641, at *4 (Tex. App.—Amarillo Jan. 21, 2003, pet. ref'd) ("Because appellant established both elements necessary to show his entitlement to a new trial under Rule **21.3**(f), we must, and do, sustain his issue."); *McGary v. State*, 658 S.W.2d 673, 674–75 (Tex. App.—Dallas 1983, pet. ref'd) (declining to conduct harm analysis under predecessor statute); *Chew v. State*, 804 S.W.2d 633, 638–39 (Tex. App.—San Antonio 1991, pet. ref'd) (same); *Shivers v. State*, 756 S.W.2d 442, 444–45 (Tex. App.—Houston [1st Dist.] 1988, no pet.) (same); *Deary*, 681 S.W.2d at 788 (same).

instructions and considered outside evidence, to the detriment of Mr. Najar, when deliberating. The outside evidence was directly relevant to the key dispute in Mr. Najar's case--whether or not he knew Officer Bachar was attempting to stop his vehicle. Texas Rule of Appellate Procedure article 21.3(f) therefore required a new trial.

PRAYER

Najar requests this Court find that the State's petition for discretionary review was improvidently granted, or in the alternative, affirm the court of appeals opinion.

Respectfully submitted,

/s/Jonathan Landers
Jonathan D. Landers
State Bar No. 24070101
917 Franklin St, Suite 300
Houston, Texas 77002
Phone: (713) 685-5000
Fax: (713) 513-5505
Jlanders.law@gmail.com

CERTIFICATE OF SERVICE

I certify that a copy of Najar's Appellate Brief has been delivered to Harris County District Attorney's Office on April 17, 2020, through the e-file system.

/s/ Jonathan Landers

CERTIFICATE OF COMPLIANCE

I certify that this Brief, excluding those parts excluded by Rule 9.4(i)(1), is 11,879 words according to the Microsoft Word count, with headings, quotations, and footnotes included, in compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(B).

/s/ Jonathan Landers

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Jonathan Landers
Bar No. 24070101
jlanders.law@gmail.com
Envelope ID: 42373205
Status as of 04/17/2020 10:53:21 AM -05:00

Associated Case Party: State ofTexas

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Alane Caird	24000608	caird_jessica@dao.hctx.net	4/17/2020 9:13:15 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jonathan D.Landers		jlanders.law@gmail.com	4/17/2020 9:13:15 AM	SENT
Stacey M.Soule		Stacey.Soule@SPA.texas.gov	4/17/2020 9:13:15 AM	SENT